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No. 79-420

In the Supreme Court of the United States

OCTOBER TERM, 1979

W. SHELLEY RICHEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 594 F. 2d 1253. The supplemental order of the court of appeals on petitioner's motion for rehearing (Pet. App. 15-16) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1979, and a petition for rehearing was denied on June 27, 1979.[1] The petition for a writ of certiorari was filed as of July 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The court of appeals entered its order denying petitioner's motion for rehearing on May 3, 1979. However, the court of appeals did not deny the government's petition for rehearing until June 27, 1979.

QUESTION PRESENTED

Whether the court of appeals correctly determined that the evidence presented at trial was sufficient to support petitioner's conviction for mail fraud.

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted on 24 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to concurrent four-year terms of imprisonment and fined $1,000 on each count. The court of appeals reversed and remanded (Pet. App. 1-14), holding that the trial court had improperly admitted into evidence a summary of documents without requiring the government to lay an adequate foundation. Thereafter petitioner sought rehearing, contending that the evidence adduced at trial was insufficient and that a retrial would violate the Double Jeopardy Clause. See *Burks* v. *United States*, 437 U.S. 1 (1978). The court of appeals granted rehearing and found that the evidence presented at trial was sufficient to support petitioner's conviction (Pet. App. 15-16).

The indictment alleged that petitioner engaged in an elaborate land fraud scheme. The evidence presented during the government's case in chief showed that Thunderbird Valley, Incorporated (Thunderbird) acquired large land tracts, subdivided the tracts into lots, offered the lots for sale to the public, and accepted notes and mortgages from purchasers of the lots (Tr. 119). In order to finance its operations, Thunderbird sold and assigned the mortgages (guaranteed by Thunderbird) to private investors through an underwriter (Tr. 97-98, 131). The underwriter induced private investors to purchase the mortgages by concealing various material facts, including

the fact that Thunderbird was insolvent (Tr. 96, 462-463), that an unusually high number of mortgages were in default (Tr. 220, 662), and that many of the purported lot purchasers were in fact Thunderbird salesmen or other persons who were not bona fide purchasers (Tr. 161-162, 227-228, 313-314, 486-487, 516-517, 696-697). Thunderbird repeatedly failed to inform investors when mortgages went into default. In order to give investors a false sense of security, Thunderbird continued to make limited monthly payments on defaulted mortgages (Tr. 229, 801).

The government also presented evidence showing petitioner's knowing involvement in the scheme. Petitioner was corporate counsel for Thunderbird. He also served as an officer and director of the corporation and owned 20% of its stock (Tr. 164, 214-215, 224-225, 275, 304, 404-405, 893-894, 898-900, 1153-1154). The evidence also showed that fictitious mortgages assigned by Thunderbird had described a corporation named Village Meadows as the lot purchaser (Tr. 313-315). The Village Meadows mortages were prepared after consultation with petitioner (Tr. 161-162, 313-315, 887-890, 893-895, 898-900). The person who prepared the Village Meadows mortgages consulted petitioner directly about the legal descriptions of the property and the repayment terms (Tr. 898-900, 1153-1154). The evidence also disclosed that petitioner told Thunderbird employees not to record certain mortgages, and some of the Village Meadows mortgages were marked "not necessary to record" (Tr. 274, 308, 1068).

As corporate counsel, petitioner wrote two letters that further demonstrated his knowledge of the illegal scheme. The first letter described a mortgage covering land purportedly purchased by Thunderbird Hills (a company

controlled by petitioner's co-defendant) (Tr. 1242-1243). Attached to the letter were ledger sheets showing that Thunderbird had received no payments from Thunderbird Hills but had made regular monthly payments to investors. *Ibid.* The second letter demonstrated that petitioner knew that some mortgages were not recorded, that some investors were not informed when defaults occurred, and that Thunderbird made monthly payments on mortgages even though it was not receiving money from lot purchasers (Tr. 1247-1249).[2]

ARGUMENT

Petitioner contends (Pet. 4-12) that although the court of appeals wrote no opinion when it entered its order finding that the evidence was sufficient to support his conviction, the court may have considered evidence that was presented after the government rested its case in chief. He argues that the court should not have considered such evidence, and that there is a conflict among the circuits on this issue.[3]

The decisions of this Court establish, however, that in considering the sufficiency of the evidence supporting a conviction, the reviewing court may properly examine the

[2]When petitioner learned that Thunderbird was becoming insolvent (Tr. 1243-1244), he arranged for all mortgages and notes payable to his clients and relatives to be transferred from Thunderbird to a foundation that he owned, which assured repayment (Tr. 230-231, 923-924, 1116-1122). Those mortgages had a good payment record, and few ended in default (Tr. 231, 1121). The number of defaulting mortgages retained by Thunderbird, on the other hand, continued to increase (Tr. 94).

[3]Petitioner did not argue in his rehearing petition before the court of appeals that the court should confine its review to evidence presented by the government during its case in chief. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

entire trial record, even if the defendant has made a motion for a judgment of acquittal at the conclusion of the government's case in chief. See *United States* v. *Calderon*, 348 U.S. 160, 164 & n.1 (1954); see also *McGautha* v. *California*, 402 U.S. 183, 215-216 (1971). Each of the circuits, except the District of Columbia Circuit (see *United States* v. *Watkins*, 519 F. 2d 294, 297 (1975)), follows this rule. See *United States* v. *Kilcullen*, 546 F. 2d 435, 441-442 (1st Cir. 1976), cert. denied, 430 U.S. 906 (1977); *United States* v. *Tramunti*, 500 F. 2d 1334, 1338 (2d Cir.), cert. denied, 419 U.S. 1079 (1974); *United States* v. *Trotter*, 529 F. 2d 806, 809 n.3 (3d Cir. 1976); *United States* v. *Heller*, 527 F. 2d 1173 (4th Cir. 1975); *United States* v. *Perez*, 526 F. 2d 859, 864-865 (5th Cir.), cert. denied, 429 U.S. 846 (1976); *United States* v. *Black*, 525 F. 2d 668, 669 (6th Cir. 1975); *United States* v. *Tubbs*, 461 F. 2d 43, 45 (7th Cir.), cert. denied, 409 U.S. 873 (1972);[4] *United States* v. *Wetzel*, 514 F. 2d 175, 177 (8th Cir.), cert. denied, 423 U.S. 844 (1975); *United States* v. *Martinez*, 514 F. 2d 334, 337 (9th Cir. 1975); *United States* v. *Guerrero*, 517 F. 2d 528, 530 (10th Cir. 1975). This Court has previously declined to resolve the conflict among the circuits on this issue. See *Maffei* v. *United States*, 406 U.S. 938 (1972).[5]

[4]But see the earlier decision of the Seventh Circuit in *United States* v. *Rizzo*, 416 F. 2d 734 (1969), which appears to be contra.

[5]This Court's decision in *Burks* v. *United States*, 437 U.S. 1, 16-18 (1978), does not imply that a reviewing court may not consider the entire trial record in determining whether the evidence is sufficient to support a conviction. To the contrary, the Court in *Burks* reaffirmed the rule that "a federal appellate court * * * must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision." The Court did not undertake to "re-examine in detail the standards for appellate reversal on grounds of insufficient evidence." Neither *Burks* nor *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977), purport to undermine the authority of this Court's decision in *United States* v. *Calderon*, ~~supra~~ supra.

In any event, even if petitioner were correct in contending that reviewing courts must assess the adequacy of the evidence only by considering proof presented during the government's case in chief, it is clear that the evidence summarized above was more than sufficient to sustain the jury's veridct. Viewed in the light most favorable to the government, the evidence presented during the government's case in chief clearly showed that petitioner was aware of, and participated in, the scheme to mislead investors who purchased Thunderbird mortgages. In contrast to the cases cited by petitioner (Pet. 12), the evidence established petitioner's knowing involvement in the scheme to defraud. Thus, even if the Court were otherwise inclined to undertake to resolve the conflict between the circuits, this case is not an appropriate vehicle for that purpose, because the difference in standards could not have affected the result. See *Burks* v. *United States*, *supra*, 437 U.S. at 17-18; *Glasser* v. *United States*, 315 U.S. 60, 80 (1942).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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